No. 438

IN THE

Supreme Court of the United States

October Term, 1950

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LANSING, AL FUHRMAN,

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PETITIONERS

ARTHUR J. GOLDBERG

THOMAS E. HARRIS

MAX RASKIN

Counsel for Petitioners

INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Legislative Material

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1950

No. 438

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LANSING, AL FUHRMAN,

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Wisconsin (R. 81) has not yet been reported.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3). The petition for certiorari was granted on December 11, 1950.

QUESTIONS PRESENTED

Subchapter III of Chapter 111, Wisconsin Statutes, 1947, prohibits strikes by employees of public utilities and provides for the compulsory arbitration of disputes between utilities and their employees. The questions presented are whether this state statute is unconstitutional—

(1) As applied to a company engaged in interstate commerce, because it conflicts with the federal Labor Management Relations Act, 1947, or invades fields which Congress has occupied by the enactment of that statute, or

(2) Because it violates the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

STATUTE INVOLVED

The provisions of Subchapter III, Chapter 111, Wisconsin Statutes, 1947, are set forth in full in the Appendix, *infra* pp. 34 ff. and are summarized in the Argument, *infra* pp. 8 ff.

STATEMENT

This case arises out of the same labor dispute as does *St. John et al.* v. *Wisconsin Employment Relations Board*, No. 302, October Term 1950, probable jurisdiction noted, October 23, 1950.

The petitioners herein are Local 18 of the United Gas, Coke and Chemical Workers of America, CIO (hereafter referred to as the Union), and several of its officers. In 1943 the Union was certified by the National Labor Relations Board as the exclusive bargaining agent for the production and maintenance employees of the Milwaukee Gas Light Company (hereafter referred to as the Company). 52 NLRB 1213; Record, No. 302, p. 38.[1] In 1946 the Board conducted an election among the supervisory employees of the Company, which resulted in

[1] Under the practice prevailing in the Supreme Court of Wisconsin, each party prints as an appendix to his brief the particular portions of the record on which he relies, although the entire typed transcript of record is before the court. Due to the shortage of time for getting this case before this Court, and by oral agreement of counsel, there has been printed as the record in this Court only the appendix to the Union's brief in the Supreme Court of Wisconsin, plus the proceedings in that court. The typed transcript of the record which was before the Supreme Court of Wisconsin covers the background of the strike, but that portion of the record was not printed in the Union's appendix, and hence is not in the printed record in this case in this Court. However, the same material is contained in a stipulation in the record in No. 302, which involves the same labor dispute and the same parties as the present case. To avoid the delay which would be entailed in securing the certification of an additional portion of the record in this case by the Clerk of the Supreme Court of Wisconsin, reference will be made to the record in No. 302. That record will be referred to herein as R. 302, p. ——. The record in the present case will be cited as R. ——.

a vote adverse to the Union (R. 302, p. 41). In each of these cases the National Board found that the Company was engaged in commerce within the meaning of the National Labor Relations Act (R. 302, p. 41).

Thereafter successive collective bargaining agreements were entered into between the Company and the Union, of which the most recent preceding the strike terminated on June 1st, 1949 (R. 302, p. 38). Some months before that date notice of termination was given by the Union to the Company and to the Federal Mediation and Conciliation Service, as required by the contract and by Section 8(d) of the National Labor Relations Act. In response to this notification, the Federal Mediation and Conciliation Service intervened to assist in the negotiation of a new contract (R. 302, p. 38). The Wisconsin Employment Relations Board, acting under Section 111.54 of the Wisconsin Statutes, 1947, likewise appointed a conciliator for the purpose of attempting to settle the dispute (R. 302, p. 15).

On September 19, 1949, the Union filed with the National Labor Relations Board charges that the Company had violated the National Labor Relations Act by refusing to bargain collectively with the Union (R. 302, pp. 38-39). These charges were pending before the NLRB during all of the proceedings below. Subsequent to the filing of charges, the Company did bargain collectively with the Union, but no agreement was reached at that time (R. 302, p. 39).

On September 28, 1949, the Company filed with the Wisconsin Employment Relations Board a petition for the appointment of a conciliator. The petition alleged that the Company was a public utility employer within the meaning of the State statute; that its production and maintenance employees were represented for collective bargaining by the Union; that the last agreement between the Company and the Union had been terminated by the Union; that the Company had attempted through collective bargaining to negotiate a new contract with the Union but that negotiations have reached an impasse; and that the parties would be unable to settle the dispute without the intervention of the "conciliation and/or arbitration processes provided for" in Chapter III of the Wisconsin Statutes.

The petition requested the appointment of a conciliator for the purposes set forth in Sections 111.54 and 111.55 of the Wisconsin Statutes (R. 302, p. 1314).

On October 3, 1949, the Wisconsin Board issued an "Order Appointing Arbitrators" pursuant to Section 111.55 of the State Statute (R. 39). The order named five persons as those from which a Board of Arbitration to determine the dispute would be elected. It directed the Company and the Union to meet for the purposes of each striking one name from the list, the remaining three persons to be designated by the State Board as the Board of Arbitration "to which will be submitted the issues in dispute between the parties".

On October 4, 1949, the Union filed suit in the Federal District Court for the Eastern District of Wisconsin to enjoin the Wisconsin Board and others from compelling the Union to submit the dispute to arbitration or from otherwise enforcing against the Union the provisions of the Wisconsin Statute (R. 302, pp. 16-17, 12-13). That proceeding is now before this Court in No. 302.

At 6 A. M. on October 5th, 1949, the employees of the Company went on strike (R. 11). At about 11 A. M. of the same day the Wisconsin Board, acting under the provisions of subchapter III, Chapter 111, Wisconsin Statutes 1947, filed a complaint in the Circuit Court of Milwaukee County against the Company, the Union, and various officers of each. The complaint alleged that the Company was a public utility; that the Union was the collective bargaining representative of certain of the Company's employees; that these employees were engaged in the performance of service essential to the public; that a labor dispute existed between the Company and the Union with respect to wages, hours and other conditions of employment; and that the Union had called a strike and established a picket line (R. 16-19). The complaint further alleged that the Company had failed and neglected to exert every reasonable effort to settle the dispute by collective bargaining; that the strike would cause an interruption of an essential service to the public; that the Company was violating Section 111.52 by failing to take every reasonable effort "to prevent the collective bargaining process from reaching a state of im-

passe"; and that the Union was violating Section 111.62 by instigating and inducing a strike which would cause interruption of an essential service.

The Wisconsin Board asked for an injunction against both the Company and the Union. It asked that the Company be enjoined from "failing and neglecting to exert every reasonable effort to settle any labor dispute" between the Company and the Union "and to prevent the collective bargaining process from reaching a state of impasse and stalemate"; and that the Union be enjoined "from calling a strike, going out on strike, or causing any work stoppage" (R. 19). An *ex parte* temporary restraining order was thereupon issued against both the Company and the Union, and was served upon some of the petitioners at about 2 P. M. (R. 19).

Thereafter, a conference was arranged between the Company and the Union, which continued throughout the night of October 5th. At about 8 A. M. the next morning an agreement was reached, a contract was signed and the strike was terminated (R. 11).

Following the settlement of the strike, the Wisconsin Employment Relations Board petitioned the Circuit Court of Milwaukee County to issue an order to show cause why the petitioners should not be adjudged guilty of contempt for failing to call off the strike immediately upon issuance of the temporary restraining order (R. 43). On October 10, 1949, such an order was issued (R. 42).

In their answer to the Wisconsin Board's complaint, the petitioners asserted that Subchapter III, Chapter 111 of the Wisconsin Statutes, 1947, was unconstitutional as in conflict with the Federal Labor Management Relations Act, 1947 (R. 24). The Circuit Court held, however, that the decision theretofore rendered by the Supreme Court of Wisconsin in *United Gas, Coke and Chemical Workers* v. *Wisconsin Employment Relations Board*, 255 Wis. 154, a suit for a declaratory judgment to which some of the petitioners were parties, was *res judicata* as to the constitutionality of the Wisconsin Act (R. 3-5). On March 14, 1950, the Circuit Court found petitioners guilty of contempt and fined them $250.00 each (R. 8).

On October 18, 1949, the petitioners herein, and others, filed

an amended complaint in the suit in the Federal District Court for the Eastern District of Wisconsin which is now before this Court in No. 302. The complaint alleged that various punishments were threatened by virtue of the facts above set forth, including contempt citations and criminal action against the Union and its officers (R. 302, p. 7). The petitioners asked the District Court to enjoin any proceeding against them, on the ground that the Wisconsin Statute was unconstitutional and void as in conflict with the Federal Act. On April 28, 1950, a three judge District Court held, with one judge dissenting, in accord with the decision of the State Circuit Court, that the prior decision of the Wisconsin Supreme Court was *res judicata* as to the constitutional issues.

An appeal was taken to this Court, and probable jurisdiction was noted on October 23, 1950. No. 302 this term.

The petitioners in the present case had in the meantime appealed the state court litigation to the Wisconsin Supreme Court. That Court held on November 8, 1950, that the Wisconsin Statute did not conflict with the Federal law and was constitutional (R. 81). The Wisconsin Supreme Court, whose prior judgment had been held to be *res judicata* by the State Circuit Court and by the three judge Federal District Court, did not in its opinion so much as suggest that its prior judgment was *res judicata*. It dealt with the constitutional issues on their merits.

In its opinion the Supreme Court of Wisconsin declared that the decision of this Court in *Automobile Workers* v. *O'Brien*, 339 U. S. 454, was distinguishable from the present case because the *O'Brien* case dealt with a private corporation, whereas the present case involved a public utility. The Wisconsin Court noted that in the *O'Brien* case this Court had said "that the regulation of the right to peacefully strike for higher wages had been pre-empted by Congress", but went on to declare, however (R. 86), that

> "Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through

> agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies."

The Wisconsin Court also referred with approval to the decision of the Supreme Court of New Jersey in re *New Jersey Bell Telephone Co.*, decided October 2, 1950, 26 LRRM 2585, and concluded "that the public utility anti-strike law does not conflict with any Federal Act".

This Court granted certiorari on December 11, and assigned the case for argument following Nos. 302, 329 and 330.

SPECIFICATION OF ERRORS

The Supreme Court of Wisconsin erred:

1. In holding that Subchapter III, Chapter 111, Wisconsin Statutes, 1947, is constitutional, and in failing to hold that it is unconstitutional.

2. In affirming the judgment of the Circuit Court for Milwaukee County adjudging the petitioners guilty of contempt, and in failing to reverse that judgment.

ARGUMENT

Petitioners' position, most broadly stated, is that Congress, in enacting the Labor-Management Relations Act, 1947, intended to and did provide a broad national code to govern exclusively labor-management relations in industries affecting commerce. It is the petitioners' position that, except as otherwise specified in the Labor-Management Relations Act itself, that Act fully occupies the field of regulation of labor-management relations, and leaves to the states only the power to curb violations of the peace. As stated in *People of State of California* v. *Zook*, 336 U. S. 725, 734—

> "the tradition of 'usual police powers' is still of aid in determining congressional intent to exclude State action on interstate commerce, at least when Congress has legislated."

However, it is not necessary for the petitioners to sustain this broad proposition in order to prevail in the present case. At the least the National Act fully occupies the fields of regulation of collective bargaining and of the right to strike in industries affecting commerce. Moreover the Wisconsin Statute here involved squarely conflicts both with general policy of the National Act and with various of its detailed provisions.

Petitioners will present first their contention that the Wisconsin Act conflicts with the Federal Act, and thereafter the broader propositions that the Federal Act occupies the entire field of labor relations to the exclusion of state regulatory action, or, at the least, the fields of regulation of collective bargaining and of the right to strike.

I

THE WISCONSIN STATUTE CONFLICTS WITH THE NATIONAL ACT

The Wisconsin Statute and the National Act rely on diametrically opposite means of promoting sound labor relations. The Wisconsin Act employs compulsory arbitration and prohibits strikes, while the National Act relies on agreements voluntarily arrived at through collective bargaining, and does not provide for compulsory arbitration or absolutely ban strikes even in "national emergency" disputes. As is to be expected in view of this square conflict between the basic schemes of the two Acts, the Acts also conflict in numerous details.

A. The Provisions of the State Act

The Wisconsin Statute with which we are here concerned is Subchapter III of Chapter 111, Wisconsin Statutes, 1947, dealing with labor relations between public utility companies and their employees.

The Statute declares at the outset, in Section 111.50, that "the interruption of public utility service" results in damage to the public justifying action to protect the general welfare, and that it is the public policy of the State (a) to facilitate the

peaceful settlement of labor disputes between public utility companies and their employees through the making and maintaining of collective bargaining agreements, and (b) "to provide settlement procedures" for such disputes "in cases where the collective bargaining process has reached an impasse".

Pursuant to this declaration of policy the Wisconsin Act provides, in Section 111.52, that it shall be the duty of public utility employers and employees "to exert every reasonable effort" to settle their labor disputes through collective bargaining, and (§111.54) that if negotiations reach an impasse the Wisconsin Employment Relations Board shall appoint a conciliator to attempt to effect a settlement.

If, however, the conciliator is unable to effect a settlement within 15 days, the Employment Relations Board must then appoint an arbitrator or arbitrators "to hear and determine such dispute" (§111.55). The mechanism of selection is that which was used in the present case: viz., the Board appoints a panel of either three or five persons from which each of the parties strikes one name, with the person or persons remaining serving as the arbitrator or arbitrators.

During the pendency of conciliation or arbitration proceedings the existing wages, hours or conditions of employment may not be changed by either party without the consent of the other (§111.50).

The arbitrator (or arbitrators) is required to conduct hearings and to make a written decision on each issue in dispute (§111.57). He may compel the attendance of witnesses and the furnishing of information. If a valid contract is in effect, the arbitrator is empowered only to determine its interpretation. If no contract is in effect, "or where there is a contract, but the parties have begun negotiations looking to a new contract or an amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute", the arbitrator "in arriving at a decision" is directed to give weight to a number of enumerated factors. These factors (set forth in §111.57(3)) are (a) and (b) comparison of wage rates or other working conditions with those prevailing in the local operating area, and for workers possessing similar skills; (c) the value of the

service to the consumer; (d) the desirability of establishing differentials for different areas; and (e) the total over-all compensation received by the employees including fringe benefits. However, (§111.57(3)(e)) the enumeration of these factors is not to preclude the arbitrator from taking into account other factors "which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties".

The Statute provides, however (§111.58), that: "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business . . ."

The decision of the arbitrator (or of a majority of the arbitrators) must be filed with the Circuit Court of the county (§111.59). Unless the award is reversed upon a petition for review, it becomes binding upon "and shall control the relationship between" the parties for a period of one year, except that the order may be changed by mutual consent of the parties. The decision may be made retroactive to the termination of the last contract or to the beginning of the dispute.

Either party to the dispute may secure judicial review (§111.60). The grounds on which the award may be set aside are enumerated in the Statute and include "that the order is not supported by the evidence".

The Statute provides independently, and without regard to the pendency of conciliation or arbitration proceedings, that it shall be unlawful for employees of a public utility to strike or to engage in a work stoppage "which would cause an interruption of an essential service"; and that it shall be unlawful for anyone to instigate or induce such a strike or work stoppage (§111.62). Lockouts by public utility employers are similarly forbidden. Violation of this section constitutes a misdemeanor.

The Statute also provides (§111.63) that the Board shall enforce compliance with its provisions, and may sue to enjoin violation.

A subsequent section of the Statute (§111.64) provides that individual employees shall have the right to quit work "unless done in concert or in agreement with others" and that it is the

intent of the subchapter only to prohibit employees from striking or in engaging in a work stoppage in "concert".

The Statute closes with the usual separability clause (§111.65).

Thus, in essence, the Statute prohibits strikes by employees of public utilities, and provides that labor disputes between public utilities and their employees shall be settled by compulsory arbitration.

B. Conflict with the National Act

The labor relations policies embodied in the Labor-Management Relations Act, 1947, differ radically from those which underlie the Wisconsin Statute. Like the Wagner Act which preceded it, the Labor-Management Relations Act relies primarily upon voluntary agreements arrived at through collective bargaining to promote industrial peace while preserving to management and labor the rights essential to a system of competitive free enterprise. The employees' right to strike and managements' right to lockout are, with certain specified exceptions, preserved as essential to a free economy and as incentives to reaching agreement through collective bargaining in preference to a trial of economic strength.

1. *The basic policy to promote voluntary labor agreements through collective bargaining*—Section 1 of the National Labor Relations Act—that act is Title I of the Labor-Management Relations Act, 1947—declares it to be the policy of the United States to encourage "the practice and procedure of collective bargaining". Section 1 likewise declares that protection by law of the right to bargain collectively removes sources of industrial strife and unrest and restores equality of bargaining power between employers and employees. Both of these provisions were carried over into the present law from the Wagner Act. The present National Labor Relations Act likewise retained in Section 8(a)(5), the provision of the Wagner Act making it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, and it added to the Wagner Act new provisions requiring unions to bargain collectively with employers

(Section 8(b)(3)) and defining the obligation to bargain collectively (Section 8(d)). This definition explicitly declares that the "obligation does not compel either party to agree to a proposal or require the making of a concession".

Title II of the Labor-Management Relations Act, which deals with conciliation of labor disputes and with national emergency strikes, likewise begins by declaring in Section 201, "That it is the policy of the United States that—(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining" between employers and unions. It goes on to recite in subsection (b) that the settlement of issues through collective bargaining may be advanced by making available governmental facilities for conciliation and *"voluntary arbitration"*. Finally, Section 201(c) recites that it is the policy of the United States that certain labor controversies may be avoided or minimized by making provision for adequate notice of any proposed changes in existing agreement and for the "final adjustment" of grievances regarding the application or interpretation of such agreements. (Italics supplied.)

The same policies to promote voluntary agreement through collective bargaining, to encourage agreements to arbitrate questions of contract interpretation, contracts, but to avoid compulsory arbitration, are articulated in Section 203 of the Act, dealing with the functions of the Federal Mediation and Conciliation Service. Section 203(c) provides that if in a labor dispute the Director of the Service "is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties *voluntarily* to seek other means of settling the dispute without resort" to strike or lockout. (Italics supplied.) The section further provides, however, that: "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act."

Section 203 then goes on in subdivision (d) to declare that: "Final adjustment by a method agreed upon by the parties"

i.e. such as arbitration, "is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement".

Section 205 of the Act establishes a National Labor-Management Panel "to advise in the avoidance of industrial controversies and the manner in which mediation and *voluntary* adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country". (Italics supplied.)

Title II of the Labor-Management Relations Act, 1947, also deals with national emergency strikes. It provides (Section 206) that if the President finds that a labor dispute will "imperil the national health or safety", he may appoint a Board of Inquiry. The Board shall report on the facts of the dispute, but may not make any recommendations as to its settlement. After receiving the report of the Board, the President may direct the Attorney General to secure an injunction against the strike or lockout (Section 208). The injunction, however, may continue only for a maximum of 80 days and must be discharged at the end of that period (Section 210). At the end of 80 days, the employees are free to strike and the employer is free to resort to a lockout.

Thus even in dealing with national emergency disputes the National Act does not provide for compulsory arbitration or absolutely ban strikes. Indeed, the Board of Inquiry appointed by the President is not even permitted to make recommendations as to settlement of the dispute.

The Title does recite in Section 209(a) that whenever a district court has issued an 80-day injunction, "it shall be the duty of the parties to the labor dispute . . . to make every effort to adjust and settle their differences, with the assistance" of the Federal Mediation and Conciliation Service. The section goes on to declare, however, that: "Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service".

Thus the Labor-Management Relations Act goes to great pains to make it absolutely clear at every appropriate point that nothing in the nature of compulsory arbitration is con-

templated or permissible under the Act, either in the usual labor dispute or in a national emergency strike.

The Federal Act thus squarely conflicts in its basic policy with the Wisconsin Statute here under consideration.

It has been said that there are only three conceivable labor relations policies. One such policy, and the one which largely prevailed throughout the 19th century and in the first part of this century, is individual bargaining. Under this policy each individual employee must make such terms as he can with his employer. A second possible labor policy is to protect the creation of unions and to encourage collective bargaining between unions and employers. That was the national labor policy adopted in 1935. The third conceivable policy is compulsory arbitration. That is the policy established by the Wisconsin Statute, but it conflicts squarely and basically with the Federal policy.

2. *The right to strike*—Free trade unions can exist and perform their economic functions only if they may strike at appropriate times and on appropriate issues. Genuine collective bargaining likewise can exist only when each of the two parties—management and labor—have real bargaining power. Hence the National Labor Relations Act, pursuant to the national policy to recognize free trade unions as an essential part of a competitive free economy, and to implement the national policy of promoting collective bargaining, recognizes and protects the right of workers to form unions, to bargain collectively, and to strike. The concomitant right of employers to lockout is likewise recognized.

Without the rights to strike and lockout there can be no real collective bargaining. Parties cannot bargain unless they have something to bargain with. In a recent study "Strikes and Democratic Government" (1947) the Labor Committee of the Twentieth Century Fund has pointed out how essential the right to strike is to any real collective bargaining (pp. 12-13):

> "In genuine collective bargaining . . . the possibility of a strike or lockout is . . . an ever-present and controlling factor in the realistic processes of collective bargaining. Those processes lose all color of reality if the workers have

> not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or to lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences . . . Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results. Thus, for the ordinary labor dispute, the possibility of a strike or lockout is, in the last analysis, the most potent instrument of persuasion."

Section 7 of the National Labor Relations Act accords to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

In addition to these provisions, the right to strike is explicitly recognized in Section 2(3) of the Act and in Section 13, the latter of which provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

By these provisions, as this Court recently pointed out in *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457, "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike".

That a peaceful strike for higher wages, which is not in violation of an existing contract, is legalized and approved by the Federal Act has been settled since the early days of the Wagner Act. *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345-347. The Court also held, however, under the Wagner Act, that a sit down strike (*NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240) or a strike in breach of contract (*NLRB* v. *Sands Manufacturing Company*, 306 U.S. 332) were not legitimate concerted activity within the protection of the Federal Act. On that basis labor violence

was held to be subject to state police control. *Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740.

Congress was aware of these decisions when it supplanted the Wagner Act by the present Act, and it specifically intended to continue in effect the existing protection of the right to strike, except as otherwise specifically provided in the new Act. The final clause of Section 13—"or to affect the limitations or qualifications on that right"—was added to the similar provision of the Wagner Act by the Taft-Hartley Act. That this clause was not intended as a limitation upon the right to strike recognized under the Wagner Act is evidenced by the report of the Senate Committee, which states:

> "Section 13 has been amended in two respects: (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act; (2) by the addition of the words 'to affect the limitations or qualifications on that right.'
>
> "It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives (See *American News Co.*, 55 N.L.R.B. 1302, and *Thompson Products*, 72 N.L.R.B. 150). The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal law (*Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp.* v. *N.L.R.B.*, 306 U.S. 240).
>
> "This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions." Senate Report No. 105, 80th Cong., 1st Sess., p. 28.

That Congress, in enacting the Labor Management Relations Act, specifically intended to guarantee to employees in industries affecting commerce the right to strike to obtain legitimate economic objectives is also evidenced by the statements of Senator Taft, the author of the National Act, upon the floor of the Senate:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems

must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that *we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract.* We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions . . .

". . . So far as the bill is concerned, we have proceeded on the theory that *there is a right to strike* and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation." 93 Cong. Rec. 3835 (1947) (emphasis supplied).

This statement was quoted in part by the Court in the *O'Brien* case.

The *O'Brien* case is conclusive against the validity of the Wisconsin Statute here in question. In that case the Court held invalid the strike vote provisions of the Michigan Labor Mediation Law. That law prohibited the calling of the strike unless a prescribed procedure for mediation had been followed and unless a majority of the employees in a state-defined bargaining unit had authorized the strike in a state-conducted election. The Court pointed out that Congress had since the Wagner Act expressly recognized the right peacefully to strike for lawful objectives, and that in the Taft-Hartley Act it had "qualified and regulated that right" in some detail (339 U.S. at 454). The Court pointed out that by the latter Act Congress had established certain notice requirements, had forbidden strikes for certain objectives, and had prescribed detailed procedures for strikes which might create a national emergency. The Court then declared (339 U.S. at 454):

> "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."

The Court then went on to add that even if some state legislation in this area could be sustained, the particular statute could not stand because it conflicted with the Federal Act. It pointed out that the Michigan law had different notice requirements from those of the Federal Act, and that it required a strike vote while the Federal law does not. The Court concluded by quoting with approval its earlier reaffirmation in *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245, 252, of "the principle that if 'Congress had protected the union conduct which the State has forbidden . . . 'the state legislation' must yield.' " (339 U.S. 454)

The Wisconsin Statute here involved conflicts far more basically and directly with the Federal Act than did the Michigan law involved in the *O'Brien* case. The Michigan Statute merely qualified the right to strike and placed certain procedural restrictions upon its exercise. The Wisconsin Statute abrogates the right entirely. A more direct conflict with the Federal Act is difficult to conceive.

The rationale of the Court in *Auto Workers* v. *Wisconsin Board* likewise supports the conclusion that the present Wisconsin Statute is invalid. In that case the Court upheld an order of the State Board prohibiting recurrent unannounced work stoppages to win unstated ends. The Court held that the conduct in question was not legitimate concerted activity within the protection of the Federal Act. But, as subsequently pointed out in the *O'Brien* case, the Court clearly assumed that had the conduct been a legitimate strike within the protection of the Federal Act there would have been no room for State action.

3. *Other conflicts*—In view of the direct and fundamental clash between the Federal and State Statutes on voluntary agreement versus compulsory arbitration and the right to strike versus a prohibition against striking, it is perhaps supererogatory to point to additional conflicts between the two Acts. There are, however, a number of other conflicts

between the Acts, or possibilities of conflict in their administration by the National and State Boards.

a. *Nature of the obligation to bargain*—The National Labor Relations Act, in Sections 8(a)(5) and 8(b)(3) imposes on both employers and employees the duty to bargain collectively. The nature of this obligation is spelled out at some length in Section 8(d). The latter section states that the obligation to bargain collectively requires the parties to meet at reasonable times and confer in good faith with respect to wages, hours and other conditions of employment and to execute a written contract incorporating any agreement which is reached, if that is requested by either party. Section 8(d) goes on to provide, however, that "such obligation does not compel either party to agree to a proposal or require the making of a concession".

The Wisconsin Act likewise requires public utilities and unions representing their employees to bargain collectively. It requires them "to exert every reasonable effort" to settle their labor disputes by the making of agreements through collective bargaining (§111.52). That requirement to bargain, particularly when viewed in the statutory context of a prelude to compulsory arbitration, in all probability has a content different from that of the Federal Act. The State Statute may well require the making of concessions, while the Federal Act explicitly does not.

At the least, conflicting determinations between the National and the State Boards as to whether an employer or a union has violated its duty to bargain are exceedingly probable. That determination having been entrusted by Congress to the National Board, the State may not confer concurrent jurisdiction upon its creature. *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U.S. 953.

b. *Scope of the duty to bargain*—The Wisconsin Statute prohibits the arbitrator or arbitrators from making any award "which would infringe upon the right of the employer to manage his business" (§111.58). In one of the cases now before this Court, No. 330, the Union's proposal that certain employees be kept on particular shifts was rejected by the arbitrators on the ground that to grant the request would vio-

late the provision of the statute. (Record No. 330, p. 198).

The National Board has held, however, that under the National Act an employer must bargain with a union with regard to work schedules and the composition of shifts. *Woodside Cotton Mills*, 21 NLRB 42, 54-55; *American National Insurance Co.*, 89 NLRB No. 19.

Here again there is conflict, or at least the probability of it, and it is the National Board which has been empowered by Congress to make the determination.

c. *Unilateral changes in existing contracts*—The State law provides that during the pendency of conciliation or arbitration proceedings, the existing wages, hours, or conditions of employment may not be changed by either party without consent of the other. (§111.50) The National Labor Relations Act, however, requires only that an employer continue in effect the terms and conditions of the existing contract for 60 days after notice of termination or until the expiration date of the contract, whichever is later (Section 8(d)(4)). An employer is, it is true, under certain additional restrictions with regard to unilateral changes, arising out of his duty to bargain collectively and to refrain from unfair labor practices. However, the Board has long interpreted the Act as permitting an employer, if the requirements of Section 8(d)(4) have been met, and an impasse in negotiations has been reached, unilaterally to put into effect changes in wages, hours or conditions of employment which have been offered to the union but rejected by it.

An employer exercising the right accorded him under the National Act would, however, be in violation of the State Act if conciliation or arbitration proceedings were pending.

d. *Effect of voluntary reopening*—The State Act provides for compulsory arbitration not only when no contract is in effect, but when a contract is in effect but the parties have begun negotiations looking to a new contract or a change in the existing contract (§111.57(3)). Thus under the State law if the parties voluntarily reopen negotiations they subject themselves to compulsory arbitration.

The National Act, in contrast, specifies that neither the employer nor the union is under any duty even to discuss

modification of the terms of a contract "if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract" (Section 8(d)), and there is no doctrine under the National Act that either party waives any rights by voluntarily discussing issues not subject to renegotiation under the contract. In that situation, as far as the National Act is concerned, either party may at any time break off negotiations and stand on his rights under the existing contract.

Thus the National Act places no barrier in the way of the voluntary reopening of labor agreements in advance of their expiration dates. Under the Wisconsin Act, however, if an employer or a union enters upon such negotiations, he opens himself to compulsory arbitration with regard to the issues which he has discussed, if no agreement on them is reached.

Under the National Act employers and unions are often quite willing to discuss issues which are not technically open for renegotiation. Under the State Act they certainly would not be.

C. The Labor-Management Relations Act, 1947, Applies to Public Utilities Affecting Commerce Which Are Privately Owned

From its opinion in the present case the Supreme Court of Wisconsin seems to be under the impression that the National Act does not apply to public utilities, and its opinion even seems to suggest that the National Act could not constitutionally apply to public utilities. Thus the Court said (R.):

> "Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers."

There is, of course, not the slightest basis in the language of the National Act or in the decisions of this Court, or in any known constitutional doctrine, for these assertions by the Supreme Court of Wisconsin.

The National Act does not either in Title I (the National Labor Relations Act) or in Title II ("Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies") draw any distinction between privately owned public utilities whose operations affect interstate commerce and other industries.

It has been settled since the early days of the Wagner Act that the National Labor Relations Act applies to privately owned public utilities if their operations affect interstate commerce. *Consolidated Edison* v. *NLRB*, 305 U.S. 197; *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18. The National Labor Relations Board long ago rejected the argument advanced by the Supreme Court of Wisconsin that privately owned public utilities should be exempt from the National Act because of the minute regulation to which they are subjected by the states and because of their importance to the localities in which they operate. The National Board pointed out in *El Paso Electric Company*, 13 NLRB 213, 240 (1939) that the National Act does not "distinguish between public utility employees and those otherwise employed". Hence, the National Board has always entertained unfair labor charges and conducted representation proceedings with respect to privately owned public utility plants whose operations affect interstate commerce. Indeed, it has conducted two representation proceedings with respect to the very plant involved in the present case. No decision of the Board taking jurisdiction over a utility has ever been upset by the Courts.

Insofar as the Constitution is concerned, there is, of course, no constitutional barrier to the application of the National Act even to State-owned public utilities if their operation affects interstate commerce or brings them within the scope of any other Federal power. *United States* v. *California*, 297 U.S. 175.

Publicly owned plants are, however, excluded from the scope of the National Labor Relations Act by Section 2(2) which states that the term "employer" shall not include "the United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political sub-

division thereof . . ." Therefore, the Federal Act does not apply to a public utility owned by a State or a municipality. It may even be that this definition leaves room for state or local action in emergencies through plant seizure, if by seizure the state or municipality becomes the employer. However that may be, there is not the slightest basis for any assertion that privately owned public utilities are exempt from Federal control either by reason of the language of the Statute or by force of any constitutional doctrine.

II

THE WISCONSIN STATUTE INVADES FIELDS WHICH CONGRESS HAS OCCUPIED

We respectfully submit that in enacting the Labor-Management Relations Act, 1947, Congress occupied a field greater even than the governmental regulation of collective bargaining and of strikes in industries affecting commerce. The broad purposes of the Labor-Management Relations Act (Section 1(b)), its legislative history and its detailed operating provisions lead to the conclusion that Congress was enacting a broad and exclusive labor code governing labor-management relations in industries affecting commerce. We believe that, except where Congress specifically so provided, this labor code leaves to the states only their "usual police powers" (*People of State of California* v. *Zook*, 336 U.S. 725, 734) to prevent breaches of the peace.

When Congress intended to leave to state control any phase of labor-management relations, it specifically so provided. Section 14(b) of the National Labor Relations Act expressly reserves to the states the power to prohibit closed or union shop agreements. See *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301. Congress also specifically left with the states the power to use their mediation and conciliation services to help the federal conciliation agencies in labor disputes affecting commerce. Sections 202(c), 203(b) and 8(d)(3). In like vein, section 10(a) of the original National Labor Relations Act was amended to permit the National Board to cede to State boards

jurisdiction over any industry except certain specified industries, but only if there were no conflict between the applicable state and federal law. This Court adverted to section 10(a) in *People of State of California* v. *Zook*, 336 U.S. 725, 732, stating that "when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U.S.C. (Supp.) §160(a), 29 U.S.C.A. §160(a)." The inference plainly to be drawn from these explicit determinations that state law should be operative in particular fields or under particular conditions is that Congress meant to leave no other scope for State regulation.

It is not necessary, however, for petitioners to sustain the broad proposition enunciated in the previous paragraph. The Wisconsin Statute prescribes compulsory arbitration and prohibits strikes in an industry affecting commerce. Since, as is clearly the case, Congress occupied the field of governmental regulation of collective bargaining and of strikes in industries affecting commerce, the Wisconsin Statute cannot stand (*Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605), whether or not the National Act is a labor code which except as it specifies otherwise excludes state action in the entire field of labor-management relations.

Congress evidenced its intention to occupy the field of governmental regulation of collective bargaining as the mechanism for promoting labor agreements voluntarily arrived at in two ways: by requiring collective bargaining of employers and unions and specifying in considerable detail the incidents of the requirement, and by refraining from enacting various proposals to have the government write the labor agreement, including proposals for compulsory arbitration of public utility disputes. Congress likewise evidenced its intention to occupy the field of governmental regulation of strikes in industries affecting commerce in the same two ways: First, by provisions it enacted specifically regulating the right to strike; second, by the provisions in derrogation of the right to strike which it expressly refrained from enacting including, again, compulsory arbitration of public utility disputes.

We have already reviewed the provisions of the Labor-Management Relations Act relating to collective bargaining, and

those preserving, except as otherwise specified, the right of employees to strike and of employers to resort to lockout.

While preserving in general the right to strike Congress carefully listed certain types of strikes and made them unfair labor practices. Under Section 8(b)(4) of the National Act it is an unfair labor practice for a union or its agents to engage in or encourage any strike for any one of the following objects:

(A) To require an employer or self-employed person to join a union or an employer organization or to force an employer or any other person to cease dealing in the products of another employer.

(B) To force or require any other employer to recognize or bargain with an uncertified union.

(C) To force or require an employer to recognize or bargain with one labor organization if another union is the certified bargaining agent.

(D) To force or require an employer to assign particular work to employees in one union or in one trade, craft or class, rather than to employees in another union or another trade, craft or class.

In addition to making these actions unfair labor practices, Congress made labor organizations liable for damages resulting from strikes in the forbidden categories (Section 303) as well as providing for injunctive relief (Sections 10(j)-(l)).

Congress not only listed the strikes which would be unlawful, but it also imposed procedural requirements conditioning the legality of strikes in industries affecting commerce. Under Section 8(d) no strike to terminate or modify a collective agreement is permissible in the absence of a sixty-day notice to the other party, thirty-day notices to federal and state mediation agencies, and bona fide negotiations in the intervening period. In addition to making the failure to follow these procedural steps unfair labor practices (Section 8(b)(3)), striking employees in such circumstances lose status as employees and the right to reinstatement. Section 8(d).

Congress also made special provision for strikes in "national emergencies". These provisions, found in Title II of the Labor-Management Relations Act, 1947, have already been outlined supra, p. 12.

These particular regulations of collective bargaining and of the right to strike were adopted by Congress only after consideration and rejection of various other proposals including, specifically, proposals for the compulsory arbitration of public utility disputes. During the legislative processes which preceded the enactment of the 1947 Act, the argument was much pressed upon Congress that labor disputes between public utilities and their employees should be handled differently from other labor disputes because of the harsh consequences to the public which might result from strikes shutting down public utilities. The argument, however, failed to persuade Congress: all proposals for compulsory arbitration of public utility disputes, or for special restrictions upon the right of public utility employees to strike, were rejected.

The first session of the 80th Congress had before it, along with the proposals which were eventually embodied in the 1947 Act, five separate though identical bills providing for compulsory arbitration of public utility disputes. See H. R. 17, 34, 68, 75 and 76, 80th Congress, First Session. These bills provided that in the event of labor disputes threatening curtailment of "transportation, public utility, or communication services, or supplies of articles or commodities essential to the public health or safety" the President should order maintenance of the status quo for thirty days, and that if the parties were unable to agree during that period the President should submit the issues to compulsory arbitration. The bills provided for the appointment of a permanent arbitration panel, from which an arbitration board would be specially selected for each dispute by the parties, just as under the Wisconsin Act. The award of the board would be binding upon both parties for six months, as compared with one year under the Wisconsin Act.

Each of the five authors of these bills testified in their support before the House Education and Labor Committee: Congressman Case of New Jersey (Hearings on Bills to Amend and Repeal the National Labor Relations Act, Eightieth Congress, 1st Sess., Vol. 5, p. 2896); Congressman Auchincloss (p. 2907); Congressman Hesselton (p. 2911); Congressman Herter (p. 2912); and Congressman Hale (p. 2921). Edward O'Neal, President of the American Farm Bureau Federation,

also urged the compulsory arbitration of public utility labor disputes (p. 1799).

Extensive testimony in opposition to these proposals was likewise given before the House Committee. Lewis Schwellenbach, then Secretary of Labor, testified at length in opposition to the compulsory arbitration proposal embodied in the five bills. He reviewed the experience of various foreign countries with the compulsory arbitration of labor disputes, and mentioned the experiments along those lines undertaken in this country some years ago by Kansas and Colorado. Secretary Schwellenbach also discussed the War Labor Board's handling of labor disputes during World War II, which he stated was "a species of compulsory arbitration".

The Secretary pointed out (House Hearings, p. 3033):

> "Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts.
>
> "The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently.
>
> "Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes.
>
> "If compulsory arbitration is to succeed in eliminating work stoppages, it is clear that it can do so only by abolishing or restricting the right to strike.
>
> "Compulsory arbitration simply means that the Government writes a contract for the parties."

Testimony against the proposals was also given by William Green, President of the American Federation of Labor (House Hearings, pp. 1630, 1658) and by Joseph A. Beirne, then President of the National Federation of Telephone Workers, now the Communication Workers of America, CIO (House Hearings, pp. 2203, 2240).

Proposals for compulsory arbitration, particularly in public utility disputes, were also considered by the Senate Committee. See e.g. the colloquys between Senator Aiken and Joseph A. Beirne (Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 1183) and between Senator Morse and Walter Reuther (p. 1307); and the testimony of Ludwig Teller (pp. 265-268), Joseph A. Beirne (pp. 1182-3, 1207, 1219), and Walter Reuther (p. 1307, 1326).

The report of the Senate Committee (Senate Report No. 105, 80th Cong., 1st Sess.), strongly opposed compulsory arbitration. It states at the outset (p. 2):

> "The committee bill is predicated upon our belief that a a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement but both sides—management and organized labor—must recognize that the rights of the general public are paramount."

A subsequent portion of the report dealing with "settlement of labor disputes" reads in part as follows (pp. 13-14):

> "In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.
>
> "Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Govern-

ment, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day waiting period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.

"It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties."

In line with the Report, the bill reported out by the Senate Committee contained no provision for compulsory arbitration or for special treatment of public utility strikes: It resembled, in general, the bill finally passed.

The issue of compulsory arbitration versus collective bargaining was extensively debated on the floor of the Senate. Senator Wiley of Wisconsin submitted a 14-point program, of which point 12 declared (Legislative History of Labor-Management Relations Act, 1947, Volume 2, p. 993):

"Where all other efforts fail and wherever the public interest is threatened by a proposed strike in a public utility like electricity, transportation, telephone, gas, or a key Nation-wide industry like coal or steel, Congress should set up means for compulsory arbitration of disputes. This means that the settlement of the dispute should be made by an impartial arbitrator or board of arbitrators which would hand down the decision which would then be binding on both management and labor. Strikes in utilities

and key Nation-wide industries must be outlawed. The public welfare must be protected."

Senator Taft, however, then the Chairman of the Senate Committee, was not in accord with these views. In a statement which has already been quoted supra p. 16, and which was quoted in part by the Court in the *O'Brien* case, he declared that: "The solution of our labor problems must rest on a free economy and on free collective bargaining." He rejected "compulsory arbitration" or any other system which would give the Government the power to fix wages, including specifically the compulsory arbitration of public utility labor disputes. He declared (Legislative History of the Labor-Management Relations Act, 1947, Volume 2, p. 1007):

"I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, 'You must work at wages fixed by the Government'? I think it is a long step from freedom and a long step from a free economy to give the Government such a right.

"It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.

Further on during the course of this statement Senator Taft said (p. 1008):

> "We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.
>
> "We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose."

The issue of whether to provide for compulsory arbitration was likewise extensively discussed on the floor of the House. (See e.g. Legislative History of the Labor-Management Relations Act, 1947, Volume 1, pp. 577-581, 586, 588, 589-590, 669, 687, 805, 821 and 868). The bill reported out by the House Committee made no provision for compulsory arbitration. Its provisions for "Strikes Imperilling Public Health and Safety" were, however, broad enough to cover public utility strikes, since they were to apply to labor disputes threatening "curtailment of interstate or foreign commerce in transportation, public utility, or communication services essential to the public health, safety or interest". (Section 203(a) of H. R. 3020, found in Legislative History of the Labor-Management Relations Act, 1947, Government Printing Office, 1948, Volume 1, p. 87) The bill passed the House of Representatives in this form.

The comparable provisions of the bill passed by the Senate applied, however, only to strikes threatening to "imperil the national health or safety". (Section 206 of S. 1126, Legislative History, Volume 1, p. 146.) This provision obviously is not broad enough to cover public utility strikes whose effect is

not sufficiently widespread to have an impact upon the country as a whole, even though they may affect interstate commerce. Nevertheless, the Senate provisions were accepted by the Conference Committee in lieu of the House provisions, and are found in the law as finally passed. (See House Report No. 510, 80th Cong., 1st Sess., pp. 63-64.) Congress thus decided to regulate public utility labor disputes having only regional effects simply under Title I of the Act—that is, under the National Labor Relations Act. Public utility disputes of national impact, however, do come within Title II, and the provisions of that title have been invoked by the government during a telephone strike. Even in "emergencies" of national impact, however, the Federal Act makes no provision for compulsory arbitration.

The rejection by Congress of all proposals for compulsory arbitration and particularly of proposals for compulsory arbitration of public utility disputes was thus a deliberate decision to rely instead on collective bargaining, plus, in national emergencies, the fact-finding boards and the 80-day injunction. Plainly Congress did not mean to leave to the states any authority to establish in industries affecting interstate commerce a different policy. Congress occupied the field fully and completely. In the language of Senator Taft, Congress decided to "cover the whole subject" of collective bargaining.[3]

After considering a myriad of proposals for dealing with strikes in industries affecting commerce, including proposals for compulsory arbitration of public utility disputes, Congress

---

[3] During a colloquy in the Senate Committee Hearings between Senator Taft and Secretary Schwellenbach as to the constitutionality of giving to the Federal courts jurisdiction over suits on collective bargaining agreements, Senator Taft stated: "Mr. Secretary, of course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective-bargaining contracts shall be made in certain ways; that both parties shall be compelled to negotiate them, and they furnish the solution for the difficulty, which is an interstate commerce difficulty. I don't quite see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore subject properly to the jurisdiction of the Federal courts. I don't understand how *we can cover the whole subject, as we do,* in Federal laws, and then say, when you come down to suing about it, that the Federal court has no jurisdiction. I don't understand that." (Senate hearings, p. 57, Italics supplied).

outlawed various types of strikes; it provided a carefully devised procedure for notices, mediation and bona fide negotiation prior to striking; it made special provision for national emergency strikes. It rejected all proposals for requiring compulsory arbitration of public utility disputes. These decisions by the Congress must be regarded under the decisions of this Court as a plain indication that the Federal Government has occupied the field and that the State may not, therefore, impose additional restrictions or regulations upon collective bargaining or strikes in industries affecting commerce.

III

THE WISCONSIN STATUTE VIOLATES THE 13TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

In the interest of conserving the Court's time, the petitioners herein are not separately briefing this question, but will rely on the briefs of the petitioners in Nos. 329 and 330.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel

THOMAS E. HARRIS,
Assistant General Counsel

Congress of Industrial Organizations
718 Jackson Place, N. W.
Washington 6, D. C.

MAX RASKIN,
606 W. Wisconsin Ave.
Milwaukee, Wisconsin

December, 1950.

APPENDIX

Wisconsin Statutes, 1947

CHAPTER 111, SUBCHAPTER III.

Public Utilities.

111.50 *Declaration of Policy.* It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 *Definitions.* When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 *Settlement of Labor Disputes Through Collective Bargaining and Arbitration.* It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 *Appointment of Conciliators and Arbitrators.* Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 *Conciliation.* If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 *Conciliator Unable to Effect Settlement; Appointment of Arbitrators.* If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 *Status Quo to Be Maintained.* During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 *Arbitrator to Hold Hearings.* (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute.

Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved:

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the em-

ployees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 *Standards for Arbitration.* The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 *Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.* The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay

shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be a matter for collective bargaining or decision by the arbitrator.

111.60 *Judicial Review of Order of Arbitrator.* Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61. *Board to Establish Rules.* The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 *Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.* It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to

conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 *Enforcement.* The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 *Construction.* (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 *Separability.* It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.